CONFERENCE

PRESIDENT OF THE FAMILY DIVISION OF THE HIGH COURT OF ENGLAND AND WALES

(The Right Honourable Sir James Munby)

on

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RUSSELL HAYES: Hello everybody. Thanks for coming. I think you all know me but I am Russell Hayes from the Press Office. Sir James is going to say a few words first and then we can go to questions. Everything is on the record and we will be doing a transcript which will hopefully appear by late afternoon. When you ask a question, please can you identify yourself and which outlet you are from. So, I will pass over to Sir James Munby without further ado. Thank you.

THE PRESIDENT OF THE FAMILY DIVISION: The reason we are here today is very simple. A number of you and various other journalists asked for an interview, some of them hoping for an exclusive interview. It seemed to me that the open, transparent and fair way of dealing with this was not to make invidious choices between you but simply to have a press conference where you could all ask your questions. I am not going to say anything by way of introduction, except this, I have been quite political in my views in recent months. It has all been on the record and if you want to know my views on the kind of topics which may be of interest to you, if you look at the lecture I gave at Edinburgh University; the lecture I gave at Liverpool University; the talk I gave to the Family Law Bar Association in May; the talk I gave to Young People's Conference on Tuesday of this week; and the interview with me which the FLB has published this week in Family Affairs, which is the in-house journal of the Family Law Bar Association, you will find a cornucopia of stuff with lots of quotable phrases. So, without more ado, who wants to start?

SANCHIA BERG (BBC): Yes, the Family Drugs and Alcohol Courts future is in question. What do you say to your successor?

THE PRESIDENT OF THE FAMILY DIVISION: The short answer to that is yes, I made public my views on this and it was published, I think, in the most recent issue of Family Law, where I published a hard-hitting comment piece, which said that this was a very important thing which we were in danger of losing, one of the most important developments in family justice in the last 40 years and you will need to check the article for the precise words I used but in effect I said that this was a lack of imagination and commitment and something had to be done about it. The immediate problem is the termination by central government of the funding of the FDAC national unit, not the FDACs themselves, but the FDAC national unit, which was the body which coordinates the work of FDAC and in terms of how new FDACs operates, I put it, as midwife and health visitor and the amount of money which is needed per annum for ongoing funding of FDAC is £250,000. When you contrast that trivial sum of money with the immense good the FDAC does some might think it is a no-brainer. It is deeply, deeply disturbing news.

FRANCES GIBB (THE TIMES): Frances Gibb, The Times. In your recent lectures and pronouncements you seemed to be expressing frustration at some of the things you set out to do, such as delays in cases and so on have not come to pass. Do you blame the Government?

THE PRESIDENT OF THE FAMILY DIVISION: One has got to be careful what one means by "government". Government usually pray in aid pressures of parliamentary time and I am not going to talk politics, either with a big or a small "p" but there are particular pressures on parliamentary time at present but as I spelled out in I think my Edinburgh lecture the history of law reform in this country is bedevilled by immense delays when even the seemingly most easy and obvious thing takes decades to be implemented. One of the examples I gave was that the single family court which was recommended for introduction in 1974 by a very high-powered committee took 40 years to be introduced, although I never heard anybody argue against it. So, there are huge processes of inertion and in some instances there is no doubt, and if you want a very topical example the speech I gave on Tuesday of this week at the Young People's Conference is very hard-hitting even by my standards, and unequivocally points the finger of responsibility in a particular quarter. I mean the punchline in that, and again you need to check the quote, I said the rules committee which changes the rules and the President, who is responsible for practice direction wished to introduce new rules and practice direction in order to put a stop to the scandal of alleged victims of domestic

abuse being cross-examinedby their perpetrators. We wanted to... in relation to that the government simply said we agreed but you will have to wait for a timetable.

In relation to another part of that overall project which I referred to, the pressing need to change the way in which we arrange for children who wish to come to court and see the court, give evidence if they want to and meet the judges, the simple fact is that the relevant working group who recommended reforms four years ago the rules committee has been pressing for it for three years and of Tuesday of this week absolutely nothing had happened and the Minister wrote a letter very recently saying that the Minister could not support either the rules, which the Rules Committee wanted to introduce and practice direction that I wanted to introduce and I said words to the effect why did the Rules Committee recommend this? Because it is the right thing to do. Why did the President recommend this? Because it is the right thing to do. Why has the Minister refused to agree? Because of the cost. That is a particular example. I think there are wider problems of inertia and I imagine somebody is going to get onto the topic of divorce law reform. I merely observe that in relation to the fact that in 1996 the government decided to implement reforms which were recommended by the Law Commission. They were never actually commenced although legislation was passed. Some years later the legislation was repealed and here we are, 22 years later, if I have got the maths right, where we are and I mean the chorus of comments in the newspapers in recent days was spurred by the decision of the Supreme Court as by and large being eloquent as to the need for reform in circumstances where many people were pressing for that reform for decades and the simple fact is that for whatever reason law reform takes an unconscionably long time sometimes.

STEVE DOUGHTY (DAILY MAIL): Sir James, you gave a few weeks ago you appeared to say or were reported as saying that effectively the decline of the two parent nuclear family was to be welcomed.

THE PRESIDENT OF THE FAMILY DIVISION: I did not say that. I was misquoted and it would be helpful if people... let me make this clear. I believe in what the great C P Scott said, “Facts are sacred, comment is free.” I was misquoted. It was taken out of context. Any fair comment based on what I had actually said would not have generated those headlines and if I might take the opportunity, one of the causes of considerable concern by many people is that the media very rarely give a link to the judgment or the text or the Court, or whatever it is on which they are commenting and it would be enormously helpful... and I mean virtually everything I saw is public, it is on the record. It is publicly available on the websites. It is worth the moment to get the text. There are some media outlets who are now putting in hyperlinks and the quotation. It would be most helpful if in future the media would adopt that as a standard practice, so that the reader could work out for him or herself whether the reporting is accurate or inaccurate. So, my answer, Steve, is read what I said, quote as much as you like, comment in the most vigorous fashion. I do not mind comment, whatever it says, but please, please, please, and this is a general plea to the media, do not quote out of context, do not misquote. I tend to craft what I say very carefully and it does not help anybody if things which are said are recorded in an unhelpfully, inaccurate way.

JOSHUA ROZENBERG: Can I start by wishing you happy birthday and congratulations on the grandchild yesterday. I know you will not comment on your cases but can I ask you to say a bit more about the decisions of the Supreme Court on Wednesday. Were you disappointed to be upheld by the Supreme Court? Does that tell us that maybe the Supreme Court these days on social issues is tending towards deference rather than activity?

THE PRESIDENT OF THE FAMILY DIVISION: Well, Joshua, a variant on that question was asked before the event and I gave my answer in the Family Affairs interview and my answer remains the same. It is a matter of complete personal indifference to me whether or not I am upheld or reversed on appeal by a superior court and of course as a judge, if I am reversed by a superior court I loyally have to follow the decision, whether I agree with it or not, but the view which I expressed publicly

beforehand was that there might be disadvantage if the appeal had been allowed because a pragmatic view might be if the appeal had been allowed, there was no problem. Reform would be off the agenda for another generation and they would simply say, "Well, Munby got it all wrong. Munby was scaremongering. We will sort it out", etcetera, etcetera. Reform would be off the agenda in circumstances where even if the House of Lords had reversed it would not have been able to reverse, I should not have thought, in a way in which would adequately reform the law. A subtle philosophical debate about whether unreasonable behaviour, to use the shorthand, is something which is assessed by reference to the quality of the behaviour, the quality of a person whose behaviour is in question or the impact on the victim of the alleged behaviour is no doubt very interesting and important from the perspective of black-letter lawyers. It does not, I should have thought, begin to grapple with the much more fundamenta questions about divorce law reform.

MONIDIPA FOUZDER (LAW SOCIETY GAZETTE): I would like to ask about all the things you have tried to do around transparency and yet even today there are notices posted up outside courts that give the impression they are still secret courts. I'd like to ask what your thoughts are on this.

THE PRESIDENT OF THE FAMILY DIVISION: My starting point and I am not saying anything I have not said before, as it happens, in judgments, my starting point... and it may be thought a rather naive, almost romantic view in the modern world, is that of the great Oliver Wendell Holmes and Louis Brandeis said in the American Supreme Court the more speech one has the more discussion one has, the more the truth is out and the best way of conquering misunderstanding, dissembling in some cases bare-faced lies, I am talking about social media rather than print or broadcast media, is actually to have more speech. The remedy is more speech, not less and Oliver Wendell Holmes' famous proposition was that if you had free speech then the truth will triumph in the marketplace of ideas. Well, that I still believe is the correct approach. The reality of course is it does not always work and the simple fact is that in relation to a huge amount of stuff on the social media, on the web, today, one could have the most transparent system in the world and it would not stop people saying what they say. Everyone could have every single Family Court completely open to the world at large. One could have complete freedom to report everything except for names and one would still, I suspect, still, I fear, see on social media the kind of material one sees today. So, that in a sense is something which will always be with us. I mean it is a predicament which did not exist in the old days because in the old days beyond printing a poster and sticking it up on the wall, essentially, you had to get some editor to agree to broadcast your views to the world, either a newspaper editor or a broadcast editors. Nowadays, of course, with social media and the internet anybody can publish anything internationally at the click of a button and therefore one has a completely free, a completely unregulated marketplace of information, ideas, dissimulation, misunderstanding and in some cases just downright untruths. I am not talking about printing and broadcasting, I am talking about social media and that, I am afraid, we will always have. If, on the other hand, one looks to the impact of all this in terms of the print media, for example, or broadcasting, I think it has transformed things. The fact is there are far more reports nowadays in newspapers than there were five or ten years ago of family cases and not just the big eye-catching Supreme court says this but much more routine stuff, which there would never have been five or ten years ago because the judgment would not have been published. In that sense, the opening up of the courts, the publication of judgments has undoubtedly affected the extent to which the family cases are being reported in the newspapers. That is all to the good and by and large the reporting is accurate. Sometimes it is not accurate. I remember a couple of year ago reading a report in a broad sheet newspaper which claimed to be a judgment of mine and I said, "This was not my case." Then, I suddenly realised that if one actually de-coded this immensely garbled report it was actually a judgment of mine but it had been so mangled and garbled in the process that my immediate reaction was the judge in the judgment being recorded was not me.

CLIVE COLEMAN (BBC): You have been so forthright in your lecturs and judgments. Can I ask you which issue concerns you most, that bedevils the family justice system?

THE PRESIDENT OF THE FAMILY DIVISION: I feared somebody was going to ask a question like that. There is not, I am afraid, a single simple answer. I mean in a sense the biggest problem, there is no secret about this, I have been expressing concerns for some time, is essentially we have static resources, whether one is talking in terms of judges, CAFCASS officers, social workers, court staff, at a time when the volume of family cases is going up very significantly and there are lots of ways of analysing the figures but very simply the volume of care cases has doubled in the last ten years. Private law cases, which are disputes not involving the local authorities, between separated parents, they are rapidly increasing. Very roughly speaking, at present, the annual increase is of the order getting on for ten percent, give or take, and that is simply unsustainable because of the compounding effect. I mean if the volume goes up by five percent... it does not actually matter what figure is whether the volume goes up by five percent, ten percent, fifteen percent, year on year, with static resources we cannot cope and I think there is a very real risk, I have said this before, and I have said this publicly before, there is a very real risk unless something is done to grapple with the situation, sooner or later, I fear sooner rather than later, the system will simply fall over. The fact is that people in the system are having to work much harder than they should be working and you would not believe the hours that the typical family judge is working, and I am talking about High Court Judges and Circuit Judges doing the main care work in the family court. You would not believe the hours the lawyers are working. The way I put it is that we have a system in which people are not really going the proverbial extra mile, they are going the extra two miles and that is not good for them. It is not good for the system. Fundamentally, we have got to ask ourselves what is the purpose of this system? It is at present demand led. Do we carrying on having a demand led system in which case we have got to have the resources, or do we somehow have a different type of system which is tailored to meet the resources made available?

GRANIA LANGDON DOWN: What would you say that you have been most disappointed not to achieve and what have you been most pleased to achiev?

THE PRESIDENT OF THE FAMILY DIVISION: It is for others to say that, not for me. It depends. If I was being asked from a sort of black-letter lawyer point of view I would bore you by giving you details of interesting judgments, which might be of great legal interest but not necessarily of great social interest. I think probably the two most important things are managing to steer the system through massive reform, both in 2014, when we set up the family court;when we introduced 26 weeks; when we introduced the test of necessity for expert evidence; when we started to get a grip on the size of bundles; and then more recently it is steering the system through the early stages of the court modernisation programme. Those have been enormous challenges. All I have been is, as it were, is the organ grinder's monkey and others designed all of us and as I have said a few minutes ago I could not have done any of this without the assistance and help of everybody else in the system. That, I think is one big thing. The other thing is I think transparency. We have got a long way to go but when you compare, I did this recently, actually in a judgment I gave quite recently, where I was being asked to decide whether a judgment given in 2002 should be made public and I rather surprised myself. I looked into stats and finding out how few cases in 2002 were on Bailii compared to the number which were on Bailii in 2018. So, things have been transformed but again there is a long way to go.

GRANIA LANGDON DOWN: But thre is also the issue of some children who do not want more transparency, they don't want journalists there.

THE PRESIDENT OF THE FAMILY DIVISION: There is and always will be a tension here. This is not a topic on which there will ever be agreement and at the risk of over-simplification, there are two views, one which tends to be reflected in the views of many children, social workers and others, is that there is already too much media coverage and that things which ought to be private are not sufficiently private, could be made more private. The other view is that we have got to open up the process because otherwise we will never get the type of support for the idea that we are a responsible accountable system of justice. That view has the benefit of hundreds of years of very

strong philosophical legal and political thinking behind Bentham and one of the important things which I have always faced up to, I have been quite open about this, is that Bentham says one of the reasons we have open justice is so that judges themselves are constantly on display and therefore constantly being criticised if they need to be criticised and I think that is so. There is no doubt that if you are sitting in open court subconsciously you do not act in quite the same way as you would as if you are sitting in private. So, I think that has been a tremendous change and as I say we will never reach agreement on this. It is a difficult question of balance. My own view, but you would say, well, he would say that, would he not, is probably we have just about got the balance right. Personally, I would certainly not go back... although I think some of the children might, because on balance I think the advantages we have had from the family justice system being made more open is a bedrock of understanding which counter balances any perceived disadvantages and it is still not clear to me how many cases are in which what has been put in the public domain actually made the world at large, rather than just neighbours identify who the family is. I am tempting fate, Mr Farmer told me in court only a few months ago, he referred me to a judgment some judge had given and I do not know whether it was two and a half minutes or three and half minutes but Brian tells me that within two and a half or three and a half minutes of Googling he had worked out from what was in the judgment who the family was but there are very few examples of that. So, I think those are the two bigs things but they are both still very much a work in progress and going back to the first one, I foolishly said in 2014, when I was selling the family justice report that what we are experiencing in 2014 is the biggest revolution in family justice any of us will ever see in our professional lives, whether we are at the beginning or the end of our career. So, I was wrong because the revolution which we are now seeing with court modernisation, digitalisation, so on and so forth, is even greater than that and online divorce is something worth looking at, simply as a process. I mean it is saving enormous amounts of money. It is much easier for litigants to navigate their way around. We are living in a world where, unhappily, some would say, far too many family litigants do not have legal aid, are on their own as LIPs, we have got to make the systems more user friendly from that point of view. I put it very dramatically, when I was called to the bar 46 years ago, what was high tech, I will tell you what was high tech, what was high tech was perhaps an electric typewriter. Do you remember what that was? A telex machine, do you remember that one? There was no email, no fax, no nothing, no nothing and if you ask yourself where are we going to be in 46 years' time, I am absolutely confident changes between 1971 and 2018 are going to be replicated from 2018 to 2064 and probably even more so. I think for those starting out their careers by the time they work through to the end, they will be living in a world, a legal world, completely different from the legal world of today. That, I think, is a jolly good thing.

GAETAN PORTAL (BBC): bearing in mind what has been said about openness and transparency, at the end of the inquest into the death of Ellie Butler, Ellie's grandfather was very concenred that he did not feel the family courts decision to return Ellie to her birth parents had been subject to any accountability. Do you think the family courts in that context can be held accountable for a judges decision that has failed .a child

THE PRESIDENT OF THE FAMILY DIVISION: There is a very important constitutional point here which I spelled out not very long ago in guidance in relation to the extent to which judges could or could not become involved in serious case reviews and this has got nothing to do with the Family Courts, it has got nothing to do with transparency, it is a far more important constitutional principle and it finds its manifestation in two propositions. One is that judges do not comment on the decisions of other judges except by way of appeal and linked in with that if you do not like a decision of a judge, the system provides remedies. One remedy is appeal and another remedy is a complaint of judicial misbehaviour if that is what you are complaining about and the simple fact is, and this is a fact, that for whatever reason in the case you refer to there was no appeal and I do not think I can properly add anything more. I am not going to be drawn into a discussions of the merits or demerits of that particular case for the reasons I have given, but as it happens it was a family case, but I am not at all convinced from what I know of the case and from what I've seen of public discussion that the fact it was a family case actually had any particular relevance or

significance in terms of what went wrong if something did go wrong, or in terms of what you say was lack of accountability.

GAETAN PORTAL (BBC): Just if I may to follow up, the reasons why there was no appeal was because the grandparents ran out of money.

THE PRESIDENT OF THE FAMILY DIVISION: I hear what you say. I do not know.

NICHOLAS HELLEN (SUNDAY TIMES): Just to follow up on Steve's question, my recollection in a speech you gave [inaudible] that this creates incredibly complex scenarios, and I am interested perhaps alluding to the [inaudible] things like cohabiting rights or fathers [inaudible] I'd be interested if you could say what the consequence of that has been for both understanding of the law and having support for [inaudible].

THE PRESIDENT OF THE FAMILY DIVISION: Well, can I just go one step back?

UNKNOWN PARTICIPANT: Yes.

THE PRESIDENT OF THE FAMILY DIVISION: The point I was making in that lecture was that this is the reality and in terms of diversity, in terms of recognising that we are a diverse society, that is something to be welcomed. This was what was to be welcomed, the diversity. It was not the destruction of the nuclear family, which is not something I referred to or welcomed. Now, the fact is and I made this clear in that and other lectures, these do raise enormously complex social issues and… those are issues which, too much of the time, the judge is left to grapple with because there is no legislative reform, and the judges cannot simply wash their hands and say, "Well, terribly sorry, we cannot do anything," we've got to do something, and as I remarked earlier this morning the fact is the Family Division, and this is nothing to do with what the judges want and nothing to do with judicial activism, simply with the reality of the facts of life, the Family Division today is dealing with all sorts of things which would have been inconceivable 20 or 30 years ago and that is simply reflecting the reality of how people are changing the way in which they live their lives, and somehow we've got to deal with that.

You touch on the fact that there is great public misunderstanding and that had been an endemic problem. I mean, the problem of cohabitants rights is something which, as I said in one of the lectures, has been around in the law as long as I've been in law, right back in the early 1970s this was being identified as a problem and legislation was being identified as the appropriate solution, but, also identified way back in the 1970s was the inerradicable public belief that something called "common law marriage", which carries with it certain rights and obligations if you've been cohabiting for a certain time, and one of the concerns about the state of the law is that precisely because there is that delusional belief deeply embedded in so many people that they acquire rights to what they think of as common law marriage, they are rather horrified when they discover they've got no rights at all. What is interesting is that this is a topic, it's an issue which has been talked about for 40 years, give or take, by lawyers, by social commentators, by media, by politicians and yet, if you look at the most recent statistics, an astonishing percentage of the population still believe there is something called common law marriage and still believe that as a result of their so-called common law marriage they end up with rights. And the one thing that proves, I am afraid, is that public education does not work.

BRIAN FARMER [PRESS ASSOCIATION]: Two follow up questions relating to secrecy and justice. I think you said [inaudible].

THE PRESIDENT OF THE FAMILY DIVISION: That's my personal view.

BRIAN FARMER [PRESS ASSOCIATION]: You talked about more judgments being published, so quite a lot of the family courts now, you sit in open court, the Court of Protection regularly sits in open court and new appeals that came in to play [inaudible] sit in open court. Mr Justice Holman [inaudible] can you see a time in the future when all family cases will sit in open court?

THE PRESIDENT OF THE FAMILY DIVISION: Well, let me answer it this way. If you go around the world, and not just… if you go around the world, including looking at common law jurisdictions, there are many courts around the world where family cases are heard in public and always have been without any particular concern and I have an idea, for example, in Scotland, to go no further, their rules about access to court are rather less restrictive than ours have been. I think we fall into the trap of assuming that what we do is sort of the conventional norm across the civilised world and if it isn not it should be, but in fact it's not, and, like so many of these things, I mean people are preaching hell and damnation but the Family Court did not collapse when I introduced the guidance and we started publishing a significant number of judgments. A lot of this is simply, and this is one of the invented problems of lawyers who tend to be, with a small 'c' I emphasise, conservative people, that we've all grown up in a system which runs in a particular way, we were taught it by our pupil masters, they were taught it by their pupil masters and we're comfortable with what we've grown up with and we tend to be uncomfortable with any kind of change, particularly if it's change in relation to sort of what we might call working practices. And if you spend half a profession lifetime in a system where there are no journalists in court, people get sort of disconcerted, and there was a graphic out recently about one of the bloggers of having gone into some court and being sort of given a very dusty answer, "What are you doing here? You're not allowed to be here," and having the patience to explain, well, actually, she was entitled to be there and this came as seemingly surprising news for the court.

BRIAN FARMER [PRESS ASSOCIATION]: They're also getting in a situation now where, Mr Justice Williams, for example, he's a judge who has grown used to me being around the family courts, we're going to have a generation of judges fairly soon who have grown used to the courts being open, and that must have an effect on what judges will think.

THE PRESIDENT OF THE FAMILY DIVISION: I am quite sure I am being slightly… you're absolutely right on that. I mean when I arrived in the Division in 2000 you could number on less than half the fingers of one hand the number of judges who had any kind of feel that we should have more openness and down the years the balance has shifted and I do not think there are any of the judges in the Division now who are uncomfortable with where we are in terms of having gone too far and, as you point out, there are some going further and I expect it is a generational thing and those who have spent the best part of their careers in silk and subsequently on the bench in the new world of transparency will take that as the norm rather than what it was when I started.

BRIAN FARMER [PRESS ASSOCIATION].**:** Do you think there will come a day when you'll sit in open court all the time?

THE PRESIDENT OF THE FAMILY DIVISION: Well, although Philip Kay rather naughtily talked up my powers of prescience this morning, saying that in 1978 I'd predicted 2014 with faultless accuracy, I do not have a crystal ball. I would not predict it will happen. What I would say is it would not completely surprise me if in due course that did happen, but that's purely a prediction. What is meant by due course, of course, how long does that take?

JANE CROFT [FINANCIAL TIMES]: Jane Croft, FT. It's now been five years since LASPO, it's been five years since the LASPO Act has been passed and I wanted to ask about the impacts of litigants in person on the courts and [Inaudible}

THE PRESIDENT OF THE FAMILY DIVISION: Well, what I would like to comment on is the reality. I am not going to link it to LASPO, I mean that's for others to do. I mean, the fact is that we have

far more litigants in person in the family courts now than we did. In care cases, subject to one or two small anomalies, there is no problem because everybody gets Legal Aid on an automatic basis, neither means nor merits tested. The problem is in private law cases, that is cases there the disputes are within the family, not between the family and the local authority, and by and large Legal Aid is no longer available for private law cases unless there's been an allegation and evidence of domestic violence. The consequence has been that very large numbers of people are now coming to court without representation.

Now, this has thrown up and brought into prominence a number of problems, which as I've frequently said we need to recognise our problem is with us, not with them. What it has done is it has shown that our present court processes, our rules, our forms, our guidance, is woefully inadequate to enable LIPs, even educated, highly-articulate, intelligent LIPs to actually understand the system, and that is a shocking reproach on us, not them. But that is a current reality. In practical terms, and I do not think I am harking back to a golden era which never existed, but in practical terms, when litigants in such cases had solicitors, for example, the solicitors would, as part of getting the case up and advising the client, manage the client's expectations and explain to the client what the client could or could not reasonably expect in terms of the court process, and therefore the litigant would be told, "Well, there's no way the judge is going to order, you know, change of residence this week, this is the process." So expectations were managed, people understood what the system was.

They now come into court having no idea at all, and therefore the work which used to be done by the solicitors in particular, managing expectations, explaining the system, now has to be done by the district judges during the hearing, and that means that hearings take longer. But the fundamental problem, I think, and I've said this weekly, is that actually it's with us. We have rules which are of Byzantine complexity. We have a book in the civil courts, it's a great two volume thing called the White Books, because it has white covers. We in the Family Court have a thing called the Red Book which has red covers, it's one volume. It is 2,500 pages of the rules and procedures which govern the Family Court. In a sense I need say no more, and surely we can have a system which does not require 2,500 pages to explain? And the trouble with that is that it is not read by lawyers and it is impenetrable to laymen and we've got to get a grip on this, and I think in a sense the solution is actually going to come through IT. Because what we've discovered is that, and this is a good part of IT, if, for example, you transfer the process from filling out the court form which people cannot do unless they are lawyers, answer an online questionnaire of the kind they are familiar with, as if you were applying for a driving licence or passport.

What we currently think of as rules of court and practices actually become part of the software, so we can actually get rid of a lot of the rules, and we have got to get to a situation where we are dealing with a book which has let us say 200 pages rather than 2,500 pages, and that is the real problem for litigants in person, they are expected to navigate a system which is impenetrable to them at a time when they are often deeply distressed, desperately want help and do not know how to go about asking for it.

I do not want to be unfair, but I remember going to… one of the things I do when I go to courts, I always try and go in through the front door to enjoy, if that's the right word, what is called the "customer experience", and it's pretty depressing if you go in through the front door of most family courts. At one family court I asked, really well, what literature, what material do you have available front of house for LIPs? "Oh," they said, "Here, we have all this, here it is." What was it? It was a rack which contained the N1, the N2, the N3, the N4, those being the numbers of court forms. Well, so what? Completely useless. I mean how is a litigant in person supposed to know whether they should be looking at an N1 or an N99? So I mean it just exemplified the fact that we do not actually help people at all, and I mean in the modern world, and of course we've got to be careful to recognise that not everybody has a computer, not everybody is computer savvy, in the modern world most people are getting their information, most people process their information online, and

we've got to get away from sort of leaflets which are unattractive to look at, not written in sensible English and which do not actually help litigants at all. But it will take a very long time.

JAMIE GRIERSON [THE GUARDIAN]: I was just wondering if you had any views on the broad independence of the judiciary and whether or not over the last… over your career you've seen a ramping up of rhetoric which demonises certain members of the judiciary, personal attacks on members of the judiciary is something that troubles you or concerns you or if it is not an issue?

THE PRESIDENT OF THE FAMILY DIVISION: I suspect, and I am not ducking the question, I suspect that any answer to that question will very much be an answer as of 2018 looking to the last 30 years, whereas if you asked the same question 45 years ago you might get a similar answer or a different answer. I mean a lot of things… we know a lot of things in public life, people look back to a sort of previous golden era which, in some mysterious fashion is always about 30 years ago, and there was a fascinating piece of research I read some years ago analysing the stance adopted at the annual party conference of home secretaries, and home secretaries whatever their party always look back to a golden era which was always 30 years before, when things were right, when crime was all right and everything else. It was always 30 years back.

These things come and go. I think… well, if one looks at the 30s and 40s and 50s, probably most legal scholars would take the view that the judiciary took quite a narrow view of its functions, was not particularly adventurous, even legally speaking, let alone in terms of [jettisoning? 00:46:59] in sort of social matters. But one forgets that, I mean, Lord Dennings heyday in a sense was the 50s and early 60s and that was an era of considerable judicial activism and considerable burgeoning of the view of what a judge should be. I mean the 1960s was when judicial review in its modern form was created by the judges, showing a much less deferential view of the central government than there's been since. So these things tend to come and go and it's the kind of topic which would actually benefit from some really detailed academic research digging into it, and I suspect that each generation have fastened on one or two things but it would not be difficult finding similar analogies. I mean, put it this way, I do not for a moment want to compare myself to the great Lord Denning but I suspect that some of the reactions which people have had about the way in which I go about things, about what I am supposed to be, in terms of being outspoken would very much reflect what people were saying or thinking about him in his heyday.

RUSSELL HAYES: How are you for time, Judge Munby? It's 12 o'clock.

THE PRESIDENT OF THE FAMILY DIVISION: I am happy to go on a little bit longer.

RUSSELL HAYES: Now, has everybody asked one question who wanted to ask one question before moving on to further questions? At the back, if someone could…

LIZ WALSH [FAMILY LAW]: Liz Walsh, Family Law. I wondered what you thought of the future in regards to family mediation and dispute resolution

THE PRESIDENT OF THE FAMILY DIVISION: Well, I am very strongly in favour, and always have been in favour of all forms of what used to be called alternative dispute resolution, now called non-court dispute resolution. It may sound odd coming from a judge, I have always long thought that we have far too many private law cases in court which should not be in court at all because if warring parents were guided by mediators and others a lot of the anger could be dissipated without the need to come to court at all. So I think it's absolutely vital. It's been in the rules now since 2010 and in every case, every hearing in every case every judge is supposed to raise with the parties the desirability, feasibility of NCDR. It does not happen very often. My own view is that it was unfortunate that the government decided as a matter of policy that mediation was the form of alternative dispute resolution.

I think there are many forms of ADR, some are appropriate in some cases, others in other cases. I do not believe you can just say "arbitration is the thing" or "mediation is the thing", for some issues, some families, some people mediation may be the answer and arbitration may be the answer for other people in superficially similar circumstances. But we've got to have more of it and we've got to have more of all of it, and in that sense I would certainly agree we need more mediation than we have at present. I mean I am not going to go into all the terrible details, but Liz, as you very well know, mediation was an important part of the reforms in 2014, it was an important spin off of LASPO. It has never taken off properly, it has never worked. The number of mediations has been going down recently and one of the issues is always said to be that paradoxically in terms of those who take George Bernard Shaw's view that all professionals are conspirators again the laity, actually the main movement for mediation in the old days was through solicitors recommended their clients to mediation. If there are no solicitors because there's no Legal Aid then that mediation goes. So whatever the reason, mediations have not taken off as we all hoped, they have fallen off of anything. The consequence is that some of the mediators are no longer viable and one of the great issues is you've got to pay for it, and who is going to pay for it? Can you pay for both sides?

So I mean I think the answer is we need more of it but we have not got there yet, and I think it is a fact that when it was recognised that the plans for mediation were not working out as people had hoped, David Norgrove, who of course would be the chairman of the Family Justice Review was asked to come back and do a specific piece of work in relation to what I think was called the mediation taskforce, to try and see what were the problems and uncover the solutions. Do not quote me on the precise figures, but as I recall he came up with a number of recommendations, let's say 14 [or about there? 00:51:48] and of which about half were implemented, when the whole point was this was a package. It was the package, the whole package and nothing but the package, and we've just sort of staggered on from then until now. It is not helpful. Arbitration is something I think is important and, as it happened, I issued guidance, was it yesterday or the day before, in terms of the use of arbitration in children cases, having previously issued guidance two or three years ago in relation to arbitration in financial cases. But we need more of those and we need to get more of these cases out of the court because court is not a good setting for people to solve their problems. It makes problems worse in many ways.

One of the problems with the court process is it emasculates the parents, it makes them more and more dependent on the judge, and the more you get sucked into that the more they find themselves unable to agree on anything and therefore the more trivial the disputes which the judge is called upon to solve. Some of you may have heard me say this before, but I happened to deal with a private law case up in the north I think three years ago and there were 30 matters in issue between the parents which they could not agree upon. Actually, they had counsel because they were quite well-heeled middle-class parents. Counsel reduced the list of things to five, but there were five matters in controversy, and the first matter in controversy which I was asked to decide was the how long should the six year-old son's hair be? Father and mother were completely unable to agree as to whether the child should have a rather short crew cut, which was the hairstyle which the father supported, or slightly more flowing locks, which was the hairstyle the mother supported, and they expected me to decide that and I said, "This is nothing to do with the fact I am President, this is not something any judge should be having to decide, you will decide this yourselves, because if I decide this you're not going to be able to agree on anything." I just said, "Go out and decide this."

Because, I mean the system in that sense does not work. It encourages people to litigate ever more and more trivial things and it's not helpful to them, and I mean Sir Andrew McFarlane in a judgment two or three years ago, pointed out that the legal expression is "parental responsibility", which means that parents, in the colloquial, have got to take responsibility for being parents and parenting their children. It does not actually help them or the children if the responsibility which actually is theirs is too easily taken over by a judge. Obviously there are big issues which have got to be decided by a judge, but we have a system where far too many trivial issues are being taken to court and, worst of all, where issues which initially are fairly trivial and manageable become, as

a consequence of the process, magnified by a process which encourages people to throw money at each other. I am afraid on that I have not changed my views. I think, Elizabeth, you'll remember I gave a judgment on this, just so happens on April Fool's Day in 2004 and I re-read that recently and I saw little reason to change my views. Perhaps that just means I am stuck in a rut, but it is a very real problem and whether it's mediation, whether it's arbitration, whether it's med-arb or whether it's conciliation we need to have much more of those.

STEVE DOUGHTY: Sir James one very quick one for clarification purposes on the [inaudible] you are against further restrictions on the publication of family law judgments [inaudible]?

THE PRESIDENT OF THE FAMILY DIVISION: My current view is that the balance has not gone too far, if anything I'd like to see some further… personally, I would favour some further relaxation/liberalisation of the process. But certainly I would not personally be in favour of, well, I would say going backwards, putting on restrictions that are not there at present.

FRANCES GIBB [THE TIMES]: Yes, also for clarification following Brian's question you've got different high court judges taking a different view about whether divorce related disputes should be in public, what is your view? And, secondly, is it time, after the Supreme Court ruling, for Parliament to review the divorce laws?

THE PRESIDENT OF THE FAMILY DIVISION: I think my own view, well, I am on the public record as saying, I mean quite clearly the divorce law is required to be reviewed by parliament, and I said as much in my own judgments in the Court of Appeal in *Owens*. I have said it extra judicially in lectures, and the outcome of the Supreme Court case can only be to reinforce the need, but in a sense it reinforces the need, the need has been there for a very long time. I mean what it striking in relation to the divorce law reform is the sheer number of judicial lawyers, academic lawyers, other commentators who say there's a desperate need for reform, and there are very few articulated voices against that. There's a lot of difference of views of what form the reforms should take, but the need for reform seems to be by and large a very widely held view at present. On transparency, and I said this recently, was it in the Edinburgh lecture, the problem is that we are, as you know, fettered by a statute dated from 1960.

Now, the Administration of Justice Act 1960 is the basic statute which provides that you cannot report what goes on in private proceedings in the Family Courts. Well, in 1960 there was no internet, no social media, no nothing. The legislation is probably the few words which are the centre of Section 12(1)(a) of the Act, have probably been more litigated over for the last 30 years than any corresponding short form of words in any other statute. It has been litigated to death, it is not satisfactory and this is nothing controversial because after all successive Lord Chancellors were saying this through the earlier years of this century, there is a need for reform. The reform, I suspect, given the statutory fetter, has got to come from a reform of the statute, but as we know that is very, very difficult. It's a highly technical subject and you'll remember that Jack Straw, when he was Lord Chancellor, [he had? 00:59:01] put through the 2009… was it the 2009 Act? It was 2009, 2010. The Act was not very well-drafted, it was never implemented and has now been repealed and that has a lesson for us in the sense that the last attempt actually to grapple with this in terms of the essential statutory framework just ran into the sand, and in that sense, although a very different context, in the legislative history of transparency, I mean divorce is precisely the same. 1996 parliament legislates on divorce, never implemented and the statute now repealed. 2009, parliament legislates on transparency, act never implemented, now repealed. So that the technical issues in a way are very considerable and one can do a lot by, as one properly and with the appropriate limits, navigating around the fetters. But it is a rather artificial exercise because of this action, which was introduced in 1960 when the world of family law was totally different from today, totally different. I mean, virtually nothing which the Family Court does today was being done by the Family Court in 1960.

FRANCES GIB B[THE TIMES]: Is this Mr Justice Holman and Mr Justice Mostyn?

THE PRESIDENT OF THE FAMILY DIVISION: They are both judges who I am sure are conscientiously exercising the discretion which the law gives them, *[Laughter]* and Frances, good try, 11 out of ten for trying *[laughs]*, but I did some while ago refer to the fundamental constitutional principle that judges cannot comment except in the Court of Appeal on what other judges do. If the cases never come before me, if the case would come before me in the Court of Appeal I would, if appropriate, express my views.

BRIAN FARMER [PRESS ASSOCIATION]: Do you think it would be helpful if someone, appealled Mr Justice Holman in the Court of Appeal heard that?

THE PRESIDENT OF THE FAMILY DIVISION: Well, one trouble is—

BRIAN FARMER [PRESS ASSOCIATION]: Or the other way around.

THE PRESIDENT OF THE FAMILY DIVISION: Yes, but if the reality is that this is a matter of judicial discretion, an appeal may not actually solve the problem, because if it's a matter of judicial discretion the Court of Appeal cannot say, as it were, in all cases public or no cases public, it'll end up saying, "Well, it's a matter for the individual judge having regard to particular circumstances of a particular case." That's one of the reasons why it seems to me probably one needs ultimately legislative reform.

SANCHIA BERG [BBC]: Yes, Sanchia Berg, Today programme. Now, you talked about the success of transparency and the fact that the judgments are being reported, but part of that is surely down to your own very forthright language. If you think about when we all heard the judgment where you talked about a case of a young girl being a *disgrace* to any country with pretensions to civilisation, ... So, you've been very forthright in your judgments would you urge other courts to follow suit, to really call out things that they think are wrong? [Inaudible] also judges like Stephen Wildblood who's also very forthright in his judgments.

THE PRESIDENT OF THE FAMILY DIVISION: Well, different judges have different styles, it reflects the needs of the case, and I do not think I am revealing anything which is not obvious, but the problem I was faced with in that case was a very, very high degree of risk that that girl would be dead within ten days unless something was done in circumstances where using more conventional language, nothing had been achieved. And it seemed to me that it was a case where one had to put it very bluntly and in very striking language because it was a question of life and death, and the evidence in that case which I set out in judgment was the considered view of the people looking after her was that if she was… within 48 hours of her being released they confidently expected to hear that she'd successfully committed suicide. That was the evidence, and one has to… well, it is permissible and in my book one has to speak appropriately in appropriate blunt language if one's faced with that kind of problem. What's the alternative? There's some inquest, a lot of hand wringing, we've all learnt lessons, it will not happen again.

Well, the other thing is, and this is a difficult matter of judicial behaviour, I think there are some kinds of cases in which very senior judges can appropriately express themselves in a particular way which would not be appropriate for less senior judges. Partly that's because some of the most difficult cases which raise these problems tend to come in front of senior judges, but I am not sure it would necessarily be very helpful if every family judge in the country who was faced with a superficially rather similar problem was to use similarly strident language. At the end of the day actually I always believe being a judge in one sense is very simple, you're answerable to two things, only two things. I am not answerable to the Lord Chief Justice, I am not answerable to any other judge. I am answerable to two things; one is my judicial conscience, encapsulated in the juridical oath, and the other is the Court of Appeal or the Supreme Court. But those are the two constraints

on a judge, and there's no doubt different judges will take different views because we're human beings.

Different judges may take different views as to what is or is not appropriate in the context of the judicial oath, and it was probably an awareness of that which made me comment in the passage which somebody read out this morning in court that in that case I quoted the judicial oath and said, "Sometimes that requires speaking truth to power." What I was saying there was that on occasions the judicial oath requires making controversial comments, and I wanted to spell that out that in my view that was something which is derived from the judicial oath, derived from the judicial conscience. But ultimately, like all matters of conscience, we all know what the words are, though they are very powerful, very important words, but just what they mean in a particular case, well, effect different judges in different ways. But I do not make any apology for the language I used in that case, and as I commented in the subsequent judgment, it was surely no coincidence that within 24 hours of my saying what I said miraculously the place, which had not previously been available, was found.

THE PRESIDENT OF THE FAMILY DIVISION: One last one.

GRANIA LANGDON-DOWN[?]: Yes, it's got two elements. How concerned are you about court closures in terms of family cases and morale, judicial morale with what's going on delays with caes?

THE PRESIDENT OF THE FAMILY DIVISION: Let me tell you, anybody who thinks that we currently have a network of courts which enables proper access to justice is deluding themselves, and the process of closing courts has been going on for many, many, many years. Let me give you a very simple example, I live in rural Wiltshire, which is a very rich and wealthy county. My local family court is about 20 miles away, there are many people in that kind of place, never mind the south west, Lincolnshire, Cumbria, Mid-Wales, Wiltshire, south of England, there are many people there who do not have a car or who only have a car but, you know, he's gone to work. So, if I was a mother having to go to the local family court without a car and without the money to pay for a taxi, how would I get there? Well, I'll tell you, I'd walk two miles down a country lane, quite nice on a day like this, not so nice and actually rather frightening if one's walking in winter and it's pitch dark, no lighting and maniacs driving along the road too fast. Two miles down the road I get to a bus stop and I'd hope the bus would come, if it does not, what do I do? If it's there, good, I hope when I get to the next market town where I have to change buses, I hope that the connecting bus is there, if it's not, what do I do? And an hour or so later, probably two hours minimum, having done a bit of walking at the other end from the bus stop to the court I get to court, and I have to do the same thing the other way round coming back in the evening. Well, if I am a mother going to court, and I always thought the one good way of testing access to justice is to take a not untypical case of a mother who has got a baby in a pushchair and a rather bolshy toddler.

That is the reality of family justice today, quite apart from the local court closures, and I was somewhere not long ago, and this was before the recent round of court closures, I was somewhere recently, I cannot remember where it was, and I am not just saying that to spare people's blushes, I cannot remember where it was. I was told that somebody the previous week had walked to court for 12 miles to get to court before court and at the end they had to walk 12 miles back home. Now, that is the reality of our present justice system. The days 50 or 60 years ago before Beeching had closed the railways and Beeching did the first lot of court closures, following closure of the railways, not so much of a problem, you've got trains everywhere and there were courts everywhere, but that's long since gone. So we do not actually and have not for quite some time had the kind of system which serves people who are dependent on public transport, and there are huge swathes of the countryside, not just in sort of central Wales that public transport is very limited. Now, going back to my example of this mother, if you said to her, "Look, there's a very simple choice, you can either make this journey on the bus and hope you get there or you can sit in your kitchen and talk to the judge on your computer by Skype." Now, I do not know what the answer would be, but one

of the things which worries me is we have not actually asked people the answer to this. We have not actually gone out and asked what in the ghastly language we have to use, our customers, the litigants, what they'd actually prefer. Now, I do not know, and I am quite willing to be told, "Well, actually, I'd rather walk the 12 miles to get to court to see a real judge than talk to the judge by Skype. But we do not ask, I think we should ask, and I would not be at all surprised to discover that significant numbers of people would be saying, "Well, actually it's a complete no-brainer, of course I do not want to go to court, I'd rather do it by Skype."

Now, that's a rather roundabout way of saying that we cannot just talk about court closures, I think the great tragedy of what's happening at the present, and this is the failure of the system to explain what we're doing, is people see the current round of court closures and the most recent round of announcements, was it two days ago, as simply the latest round of court closures in a process going back 50 or 60 years. It's not that, it's actually the first step in a complete rationalisation in the way we administer justice, and in particular replacing court buildings which are owned by the state with the use of other buildings, which we can hire ad-hoc when we need them or using electronic means. There's a real debate to be had there and different people have different views, there will be cases where you need to have physical contact with a judge, but why should we assume axiomatically that litigants all have to go and see the judge? Why should the judge not go and see the litigants? I've done it myself, I was sitting in Norwich yesterday because Norwich was more convenient for the litigants than sitting in London. In the Re X itself I sat in a place called, 'Kendal,' the court's now been closed, simply because it was more convenient for the litigants that I travelled to Kendal than all of them travel to London.

So, I do think we need to ask ourselves, and I've said this before and people think I am bonkers, when I was young one was familiar with huge vans going around the countryside, and one was the mobile library and the other, which was a similar size, was the mobile x-ray unit when TB was a big problem in this country. Well, why do not we use that kind of pantechnicon as a mobile court? It sounds bonkers, but it only sounds bonkers because we think of a court as being somewhere like this or a great thing with a royal coat of arms, but if we're serious about talking about access to justice just to put in terms of court closures, I am not getting at you, but it's an artificially narrow way of looking at it, and I think we have to have a much more holistic view. Do we need to keep the existing bricks and mortar? Should we be hiring in bricks and mortar when we need it? We do not keep a court, if the court utilisation is one day a week, two days a month, we shut the court. Well, why isn't the answer to say, "Well, we cannot keep the court going there but we do need a judge going to wherever it is one day a week, find a room in the local council offices," or something?

So, I think there are all sorts of ways in which we could think about this, and the old fashioned idea that we have to have courts, which are all grand edifices owned by the state when there utilisation is astonishingly low, we should be much more flexible and adventurous in our thinking, we should be thinking about using office accommodation, other facilities which are available in many, many places. Seriously, I think we should be thinking in some parts of having mobile courts, in mid-Wales, for example, why do not we do it? And we should be thinking much more about IT. And one of the sadnesses from my point of view is we're not really thinking about this in a holistic way, and that one of the consequences is that what was [now seriously? 01:14:25] simply seen as the latest round of court closures in the process going back to the year dot.

Just to illustrate the thing, one of the first cases I ever did in the bar in 1972 was in the Malmesbury County Court, and the Malmesbury County Court existed in those days, it was a sort of one day a month court. It actually sat in the village hall and the judge sat up on the stage and we all sat down in what would have been the orchestra pit in a posher hall, and it worked very well, and it was closed about six months later, like most of the other courts. So, the network has been being reduced for decades, and it's actually long since gone beyond the point in which we've got proper coverage in terms of the existing bricks and mortar. So, I caused shock horror, if newspapers still keep cuttings like this, and Steve will have this in his cuttings library, I caused shock and horror two

or three years ago when I picked up a point which the then chief had made, where in principle we should not even look at the other objection of using a public house, after all, within living memory inquests were held in public houses. Within living memory all sorts of courts were sitting in all kinds of local buildings, village halls, town halls and so on and so forth, we've got to back to that kind of thing.

GRANIA LANGDON-DOWN]: The issue of judicial morale in the Family Courts? Are you very concerned about it?

THE PRESIDENT OF THE FAMILY DIVISION: I am not concerned with the morale, which is astonishingly high, what is astonishing about the Family Courts is the extraordinary high morale of everybody in the system, whether judges, court staff, ushers, Cafcass, the morale is very, very good. My worry is on a different level. It is because morale is so high people are actually over working, and it is stressful work, doing back to back care cases, which an awful lot of circuit judges do, is very stressful work. It has very serious implications for people, in that sense an unrelieved diet of back to back care is not good for you, in just the same way of an unrelieved diet of back to back historic sex cases, if you are sitting in the crown court, is not good for you. The one thing which does concern me is that precisely because morale is so high, precisely because people do want to go the extra two or three miles, people do not realise the strain they're putting themselves under, and my concern is not morale. My concern is if you push people or let people push themselves too far we may have the different manifestations of stress, which is physical or mental illness. But that in a sense is the product of the fact that morale is so good, and of course, good morale is also a defence against that, but precisely because morale is good, precisely because morale is in many ways a defence against those stresses, if people do crack then it's all the more sudden and serious.

RUSSELL HAYES: I think we'll have to be drawing to a close now, thank you very much.

[Ends]